JUN 15 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

EUGENE A. NOLAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Eugene A. Nolan, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming convictions in the United States District Court for the Northern District of Oklahoma, on one count of conspiring to use interstate facilities to carry on an unlawful gambling business (18 U.S.C. § 371) and one count of actual use (18 U.S.C. § 1952).

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit, as modified on denial of the Petition for Rehearing, is not yet officially reported. It is printed in Appendix A to this petition (1a-26a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1969. A timely petition for rehearing was filed, and an opinion modifying the court's November 10, 1969, opinion and denying the Petition for Rehearing was filed on April 16, 1970. By Order dated May 1, 1970, Mr. Justice White extended the time for filing this petition to and including June 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The retroactivity of *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62 (1968):

a. Whether the defendant waived his right to challenge the Government's use of his federal wagering tax stamp during his pre-*Marchetti-Grosso* trial because he did not challenge its use until his post-*Marchetti-Grosso* appeal. There is a conflict in the circuits.

b. Whether a conviction still pending on direct appeal when *Marchetti* and *Grosso* were decided can properly be based on evidence seized under a search warrant:

1) dependent for probable cause upon the self-incrimination provided by the defendant's federal wagering tax filings.

2) grounded on alleged violations of the federal wagering tax laws. There is a conflict in the circuits.

2. Whether a search of a co-conspirator, the fruits of which are admissible against a defendant only by attributing the co-conspirator's acts to the defendant, is "directed against" a defendant under *Alderman* v. *United States*, 394 U.S. 165, 173 (1969) and *Jones* v. *United States*, 362 U.S. 257 (1960).

3. In an electronic surveillance hearing under *Alderman* v. *United States*, 394 U. S. 165, 180-85 (1969),

a. is the defendant entitled to discovery and testing procedures on the issues illegality and standing, as well as taint, and

b. does the destruction or withholding of pertinent records or evidence by the Government require,

i) that the burden of proof on the issues of illegality and standing be shifted to the government, and/or

ii) that the Government's burden on the issue of taint be increased.

4. May the defendant's federal conviction be sustained, when based upon leads from the same telephone eavesdrop which has been finally adjudicated unlawful in litigation in another circuit between the same defendant and the United States?

STATEMENT OF FACTS

Petitioner Nolan was convicted prior to this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), on one count of using interstate wire facilities in the conduct of an unlawful gambling business (18 U.S.C. § 1952), and on one count of conspiring to do so with L. D. Hines (18 U.S.C. § 371 [1952]).

A. *Question 1(a):* The Government's many references at trial to Nolan's wagering tax filings were held by the Tenth Circuit to be tantamount to their formal use against him, in violation of his privilege against self-incrimination. It affirmed his conviction, however, on the ground that he waived his right to raise the issue on appeal by failing to object at trial. (5a-9a.)*

B. *Question 1(b):* Much of the evidence introduced at trial resulted from four searches: one of Nolan's duplex in Baton Rouge, Louisiana, on January 1, 1966; one of Nolan's apartment in New Orleans, Louisiana, on January 6, 1966; and two of co-conspirator Hines' residence, on June 15, 1966 and July 17, 1966.

Identical affidavits supporting the two search warrants for Nolan's premises were grounded on alleged violations of the federal interstate wagering laws, and wholly dependent for probable cause upon Nolan's compelled self-incriminatory purchase of a wagering tax stamp. (See Appendix to Appellant's Reply Brief, pp. 1-38.) Absent the allegations that Nolan had a wagering stamp, the affidavits would be invalidated by the same defects as the affidavit held insufficient in *Spinelli v. United States*, 393 U.S. 410 (1969).[1]

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* The references so designated are to the Tenth Circuit's opinion, as modified on rehearing, reprinted in the Appendix hereto.

[1] Each relies primarily upon information supplied by "confidential informants," and does not set forth any source for the informant's information or any factual basis for concluding that he, she, or it is reliable. The only facts alleged in corroboration present innocent activity. The remainder of the affidavit is based upon (1) the affiant's personal belief, suspicion, or conclusion, (2) information received from other F.B.I. offices with no identification of source or basis for determining reliability, and (3) activity that raises no inference of criminality, independent of informant's statements, the affiant's beliefs, conclusions and suspicions, the information provided by other F.B.I. offices, or Nolan's association with others holding wagering stamps.

C. *Questions 1(b)(1) and 2:* The affidavit for the June 15, 1966, Hines search warrant, grounded on violations of the federal interstate wagering laws, was likewise dependent for probable cause on Hines' compelled self-incriminatory purchase of a wagering stamp. (See A. 1324-23.)** Excluding the allegation that Hines was on the list of wagering tax stamp holders for Oklahoma,[2] the affidavit is defective under both *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969).[2] At trial, over Nolan's objections to relevance,[3] the fruits of this search were admitted. (A. 945-46, 951-53, 990-95, 999-1001, 1082). Of these 42 items, only one[4] tended even remotely to prove that *Nolan* was using interstate telephone wires to conduct an unlawful wagering business, or that he and Hines were conspiring so to use the wires. The other 41 items tended to prove only that *Hines* was conducting a wagering business. (See A. 992-95.) Thus, they were relevant to Nolan *only* because, under the conspiracy theory, Hines' acts vicariously became Nolan's. And the court so instructed the jury. (See A. 1262-63.)

D. *Questions 1(b)(2) and 2:* The affidavit for the July 18, 1966 Hines search warrant was grounded on

** The references so designated are to the Appendix to Nolan's opening brief on appeal.

[2] The affidavit asserts nothing but the affiant's personal beliefs, conclusions and suspicions, information supplied by a "confidential informant" with no factual basis for concluding it is reliable, and innocent activity.

[3] Hines had been severed following his plea of guilty prior to trial.

[4] Gov. Exh. 6-B, containing a Baton Rouge telephone number listed to Nolan (A. 1000) in handwriting an expert testified was the same as that used to fill out Hines' wagering tax filings (A. 1020-22).

alleged violations of the federal wagering tax laws. (See A. 1323-25.) Only two[5] of the nine items admitted had even remote relevance to Nolan, the remaining seven being admissible only under the Government's theory vicariously attributing Hines' acts to Nolan. (See A. 951-53, 990-96.)

E. *Question 3:* Prior to trial, Nolan moved to suppress evidence flowing from five electronic surveillances, but the District Court ruled against him. The Court of Appeals sustained each of those rulings. (13a-25a.)

First, the Tenth Circuit affirmed the trial court's holding that Nolan failed to establish that he was the subject of two wiretaps made by special agents of the Internal Revenue Service in violation of 47 U.S.C. § 605. (14a-16a.) The first was installed by Agent Perry on another person in 1959. Despite repeated defense requests, the Government made no effort to find the tapes of the wiretapped conversations. (A. 604-06, 610, 634, 653, 737, 1145.) In line with its holding that Nolan was entitled to an adversary hearing only on taint, the trial court refused to order production of the tapes until after the defense established that Nolan's conversations had been overheard. (A. 987-88.) In support of his contentions, Nolan took the stand, and testified that he had recognized his voice when

[5] Gov. Exh. Nos. 30 and 33, each containing the numbers "19" and "4260." (A. 1021.) Gov. Exh. Nos. 39 and 40, seized from Hines in a search incident to his arrest, consisted of slips of paper containing the numbers "19" and "504 348 3197," and "19" and "348 3197," respectively. (A. 1021-22.) Since 504 348 3197 was a telephone number listed to Nolan at his duplex in Baton Rouge, the Government contended that Exh. Nos. 39 and 40 showed that Nolan was "19," and that Exh. Nos. 30 and 33 showed that 19 owed Hines 4260. (A. 1220-21.)

he had heard the tapes played in another trial. (A. 735-36, 747-49.) The defense introduced the transcript of the tape (A. 731), pointing out that it identified Nolan by telephone number, address, code number, and first name. (A. 738, 748-49, 1778; see 15a.). The Tenth Circuit nonetheless affirmed the trial court's finding that Nolan had not established standing. (16a.)

The second wiretap was installed by Special Agent Yung in Miami in 1962, on one Thomas Whalen, in aid of Yung's co-ordination of a national Internal Revenue Service wagering investigation. (A. 699, 704-07.) This was a taped 24-hour, 13-month tap, disclosing frequent telephone contacts between Whalen and Gil Beckley, a close associate of Nolan's, many of which occurred in 1963 while Beckley and Nolan were in New Orleans as co-defendants in a long trial. (A. 706-07, 709, 713, 716-17.) During this time Nolan was a prime subject of Yung's investigation. (A. 713.) The tap was manned by an unnamed agent, who forwarded the tapes to Yung in Washington, D. C., with logs highlighting the information the agent deemed pertinent to Yung's wagering investigation. After extracting and informally communicating all such information to each appropriate Regional Director, Yung erased the tapes and destroyed all written evidence except for the logs. If he sent a Regional Director any such information in writing, he followed his usual practice of attributing it to a "confidential source." (A. 706-13.) Yung destroyed the last remaining record, the logs, shortly after the tap was discontinued on January 1, 1964, because he wanted no written record of the contents of a tap he knew to be unlawful. (A. 706, 708, 710, 715, 718.) At the time of Nolan's motion, Yung testified to having almost no memory of the contents or subjects of the tap, and disclaimed any knowledge

of the identity of an Internal Revenue Service official who would know if and how its fruits had been used. The trial court refused to require the Government to disclose the identity or whereabouts of Yung's wiretapping agent, whom Yung characterized as an informer, or to produce the national information coordinators or those for Nolan's region. (A. 711, 714-15, 718, 767-73.) The Tenth Circuit sustained the trial court's holding that Nolan had failed to establish standing. (15a.)

The third electronic surveillance was conducted by the F.B.I. on Nolan's New Orleans hotel room for nine days in May, 1964. The Government produced Brown, the F.B.I. agent who testified that he installed and removed two contact microphones, one attached with masking tape to each wall adjacent to Nolan's room. Brown left immediately after checking the mikes to make sure they were operational, returning only to remove them when notified the surveillance was over. Therefore, he had no knowledge of the conduct of the actual surveillance. (A. 318-25.) The trial court refused to order the Government to produce the agents who actually conducted the surveillance to determine whether they used Brown's mikes as installed (A. 690-91), and the Tenth Circuit sustained his finding that Nolan had failed to establish that the eavesdrop was unlawful. (16a.)

The fourth and fifth electronic surveillances were conducted by the Internal Revenue Service in June and July of 1964 on Nolan's rooms in two different hotels in New Orleans. The Government produced the special agents in charge of each surveillance. It also produced one of the two hour-and-a-half tapes made during the full-time 7-day June surveillance. The

equipment and method used in each installation were identical; as to each, the agent could listen or record, but not do both simultaneously. When the agents were not recording, they were listening. The Tenth Circuit sustained the trial court's findings that, while Nolan established both illegality and standing, the Government had disproved taint, on the ground that the playing of the tapes and the agents' testimony that they heard nothing useful was sufficient to show that the Government derived no useful information from the eavesdrop. (16a-17a.) It also sustained the trial court's refusal to allow Nolan to improve the sound quality of the tapes on the ground that the Government had represented that it had done nothing to improve their quality (17a), although Nolan's purpose in seeking to improve the sound quality was to determine what information the agents would have derived if they were able to hear better than they could record. (A. 333, 339, 343, 349, 560, 596-98, 627.)

The trial judge also refused to order production of the agents having personal knowledge of the background of the case against Nolan, unless Nolan first made a formal proffer of the evidence he would elicit from each such witness. Under this ruling, he denied Nolan's request for production of the agents in charge of the Nolan investigation in his home area of Baton Rouge and New Orleans, Louisiana, or who executed the affidavits for the warrants for the two Louisiana searches here at issue; or of the officials in Washington, D. C., having personal knowledge of the source and dissemination of information on Nolan. (See A. 351-54, 640-48, 668-69, 673-88, 689-95, 767-73, 780-82, 1056, 1059.) The Tenth Circuit held that Nolan was accorded an adequate adversary hearing. (21a-22a.)

F. *Question 1:* Finally, the Tenth Circuit sustained the trial court's ruling that the Pacific Telephone & Telegraph Company's monitorings and disclosure of Nolan's telephone conversations with one Alvin Bubis were lawful. (17a-19a.) Leads from this monitoring were used by the Government in building its case against Nolan. (A. 223, 254-55, 616, 875-76, 1251; see 23a-24a.) Yet, in another case litigated by Nolan, the Ninth Circuit held that both the monitoring and its unsubpoenaed disclosure were in violation of 47 U.S.C. § 605. Accordingly, the Ninth Circuit affirmed suppression of all resulting evidence.[6] The Government did not seek certiorari from the Ninth Circuit judgment.

REASONS FOR GRANTING THE WRIT

I. Retroactivity of Marchetti and Grosso

a. *Waiver:* The Tenth Circuit's holding that Nolan's failure to object to the Government's use of his wagering tax stamp waived his privilege, created a direct conflict with the Seventh Circuit's holding in *United States* v. *Lookretis*, 398 F.2d 64 (7 Cir. 1968), cited with approval by this Court in *Knox* v. *United*

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[6] *United States* v. *Nolan*, No. 36515 in the United States District Court for the Central District of California. The District Court's order granting the motion to suppress, and dismissing the indictment, and the Ninth Circuit's affirmance thereof, *United States* v. *Nolan*, No. 24032 in the United States Court of Appeals for the Ninth Circuit, January 15, 1970, are reproduced in the Appendix to this petition. (27a-29a.) The facts surrounding the telephone company's monitoring and disclosure of that monitoring to the Government, at issue in Nolan's Ninth Circuit case and here, were stipulated to by the parties in the Ninth Circuit case, and are set forth in *Bubis* v. *United States*, 384 F.2d 643 (9 Cir. 1967).

States, 396 U.S. 77, 82 (1969).[7] Furthermore, the decision conflicts with this Court's holdings in *Grosso* v. *United States*, 390 U.S. at 71, and *O'Connor* v. *Ohio*, 385 U.S. 92 (1966), that it is impermissible to impute knowing, intelligent waiver of the privilege against self-incrimination from a failure to object at trial to a practice only subsequently declared invalid.

Moreover, in *Knox* v. *United States*, 396 U.S. at 81-83, this Court stated that the Fifth Amendment precluded the use against a defendant of self-incriminatory admissions made under statutory compulsion of 26 U.S.C. § 4412. But it left open the question of whether that rule would apply to (1) those whose convictions were final before *Marchetti* and *Grosso*, *contra*, *Mackey* v. *United States*, 411 F.2d 504 (7 Cir. 1969), cert. granted 396 U.S. 954 (1969); (2) those, like Nolan, whose convictions were not final before *Marchetti* and *Grosso*, *accord*, *United States* v. *Lookretis*, 398 F.2d 64 (7 Cir. 1968), see *O'Connor* v. *Ohio*, 382 U.S. 286 (1966) and 385 U.S. 92 (1966), *compare Tehan* v. *Shott*, 382 U.S. 406 (1966); or (3) those whose trial commenced on or after the date of *Marchetti* and *Grosso*, see *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

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[7] In *Lookretis*, as here, the issue was whether the Government's use of the defendant's wagering tax filings at his trial for violations of the interstate wagering laws (18 U.S.C. § 1952) infringed his privilege against self-incrimination. See *United States* v. *Lookretis*, 385 F.2d 487, 488-89 (7 Cir. 1967), vacated and remanded for reconsideration in light of *Marchetti* and *Grosso*, 390 U.S. 338 (1968). In *Lookretis*, as here, the defendant did not raise the issue until appeal, 398 F.2d at 66, although the case was tried in light of this Court's grant of certiorari in *Marchetti* and *Grosso*, see 385 F.2d at 489-90 n. 1. Yet the Tenth Circuit held that Nolan had waived his privilege by failing to assert it at trial (7a-9a), while the Seventh Circuit held that Lookretis had not, 398 F.2d at 66.

In view of the wide use of such information by state and federal authorities in securing convictions under statutes penalizing wagering activities, see *Marchetti* v. *United States*, 390 U.S. at 47-48, this issue should be resolved by this Court.

b. *Compelled self-incrimination as probable cause:* At issue here are the two searches of Nolan's premises in Baton Rouge and New Orleans.[8]

At all times prior to the appeal herein, this Court's decisions deemed lawful the compulsion under which Nolan provided the crucial self-incriminatory admission to being in the business of accepting wagers. *United States* v. *Kahriger*, 345 U.S. 22 (1953); *Lewis* v. *United States*, 348 U.S. 419 (1955). But, before Nolan's conviction became final, this Court's decisions in *Marchetti* and *Grosso* established that compulsion was unconstitutional. See also, *Knox* v. *United States*, 396 U.S. at 82. Thus, by the time of appeal, Nolan stood convicted on evidence that was both (1) the product of a search made without legally cognizable probable cause, and (2) the fruit of an unconstitutionally compelled self-incriminatory admission. Yet, the Government used the admission, and the evidence resulting from the search predicated upon it, in reliance on the then state of the law.

This Court has observed that the possession of a wagering tax stamp and the information contained in the wagering tax filings have been widely disseminated to state and federal authorities and used by them in criminal prosecutions for wagering offenses. *Mar-*

[8] Should this Court decide to grant certiorari on the standing issue raised in Point 2, *infra*, the search of Hines' residence on June 15, 1966, will also be in issue.

chetti v. *United States*, 390 U.S. at 47-48. Many others will therefore find themselves in the same position as Nolan, and the courts will be pressed with petitions for relief, both on direct and collateral attack.

c. *Search Warrant Grounded on Unconstitutional Wagering Tax Violations:* At issue here are the seven items seized in the July 18, 1966, search of Hines' residence, and admissible against Nolan only under the Government's theory vicariously attributing Hines' acts to Nolan.

As pointed out above, the search warrant executed July 18, 1966, on Hines' residence was grounded on violations of laws for which a defendant may not constitutionally be convicted under this Court's decisions in *Marchetti* and *Grosso*. There is a conflict in the circuits and the state courts over whether evidence seized prior to *Marchetti* and *Grosso* under such a warrant can properly support a conviction still pending on appeal. Those courts rejecting such evidence are: *Hanon* v. *United States*, 8 Cir., 1-7-70, 6 Cr. L. 2271; *Silbert* v. *United States*, 282 F. Supp. 635, as modified 289 F. Supp. 318 (U.S.D.C. Md. 1968); and *Commonwealth* v. *Katz*, 429 Pa. 406, 240 A.2d 809 (Pa. Supreme Ct., 1968). Those courts accepting such evidence are: *Washington* v. *United States*, 402 F.2d 3 (4 Cir. 1969), cert. pending, No. 22, 38 U.S.L.W. 3001; *United States* v. *Prevatt*, 414 F.2d 239, 241 n. 3 (5 Cir. 1969); *Di Piazza* v. *United States*, 415 F.2d 99, 106-07 (6 Cir. 1969), cert. pending No. 960, 38 U.S.L.W. 3342; *United States* v. *Yeagle*, 299 F. Supp. 257 (D.C.E.D. Ky. 1969); *State* v. *Sellaro*, 448 S.W.2d 595 (Mo. Supreme Ct., 1969); *State* v. *Boiardo*, 103 N.J. Super. 381 (Superior Ct. of N.J., 1968), *affirmed sub nom. New Jersey* v. *Gerardo*, 53 N.J. 261, 250 A.2d 130 (N.J. Supreme

Ct., 1969); and *Rainwater* v. *Florida*, 186 So.2d 278 (Fla. 3d Dist. Ct. App. 1966), vacated and remanded for reconsideration in light of *Marchetti* and *Grosso*, 390 U.S. 196 (1968).

2. Standing

At issue here is Nolan's standing to challenge the two Hines searches on the grounds set forth in Question 1(b).

Nolan does not contend that mere conspirator status accords him standing, or that he acquired standing to challenge the admissibility of any and all products of unlawful searches of Hines. Those issues were foreclosed by this Court's decision in *Alderman* v. *United States*, 394 U.S. 165, 171-76 (1969). What he does contend is that when the Government used evidence against him on a predicate that Hines' criminal responsibility was vicariously attributable to him, that same predicate served to accord him the right to invoke Hines' standing to challenge the legality of that evidence.[9] He bases his contention on this Court's reasoning in *Jones* v. *United States*, 362 U.S. 257, 260-67 (1960), left untouched by *Alderman*.

Jones held, 362 U.S. at 263, that the Government cannot simultaneously assert that a given status is a sufficient predicate upon which to base guilt, but an

[9] Therefore, the evidence challenged under this point is limited to that probative only of Hines' guilt of using interstate telephone wires in the conduct of a wagering business, admissible against Nolan only because Hines' guilt became attributable to Nolan under the conspiracy theory. Not challenged is the admission of the three items tending to prove the existence of the conspiracy. Nor, had the searches produced evidence directly probative of Nolan's guilt, would Nolan's standing to challenge the admissibility of that evidence be at issue.

insufficient predicate upon which to base standing to challenge evidence admissible only under that guilt theory. In *Jones*, the defendant was charged with possession of narcotics. The narcotics were seized in a search of an apartment in which Jones was an invitee. The Government contended that Jones' invitee status was not a sufficient predicate upon which to grant Jones standing to challenge the search, although it was a sufficient predicate upon which it could establish Jones' guilt of possession. This Court disagreed. 362 U.S. at 261-64. So, here, if the Government may equate Nolan with Hines for purposes of charging him with criminal responsibility for Hines' acts, it must equate Nolan with Hines for purposes of according him standing to challenge the legality of evidence admitted under that theory of vicarious criminal liability. This question is an important one, which may be expected to arise in numerous conspiracy cases until resolved by this Court.

3. The Alderman Hearing

At issue here is the Tenth Circuit's holding that Nolan received an adequate electronic surveillance hearing despite the trial court's refusal to permit him to examine government officials with personal knowledge of the Government's investigation of his case, or to require the Government to produce recordings for *in camera* or defense inspection. The trial court's rulings were based on its holding that the rights extended Nolan in an adversary hearing related only to the issue of taint, and did not arise until he had independently established illegality and standing. In affirming, the Tenth Circuit quoted *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) for the proposition that an adversary hearing and full disclosure is

not required for every issue, and cited its own holding in *United States* v. *Alderisio*, — F.2d — (10 Cir. 1970) (reprinted herein, 30a-37a). But *Alderisio* held that a defendant is entitled to an exhaustive examination, when the issue is taint, remanding for further examination of one official and *in camera* inspection of records. *Alderisio* is therefore inconsistent with *Nolan* unless the discovery rights granted in *Alderman* extend only to the issue of taint and a defendant must bear his burden on illegality and standing unaided by Government disclosure tested by adversary examination or, minimally, *in camera* inspection.

Whether the discovery and testing procedures established in *Alderman* extend to all issues is not clear. *Alderman* itself concerned only taint, as illegality was conceded, 394 U.S. at 167-68, and standing was not contested. And *Taglianetti* did not consider whether the Government was required to make disclosure of the facts relevant to standing. All that case held was that the accuracy of the Government's *ex parte* standing determination was adequately tested by an *in camera* inspection of all recordings.

Moreover, if the burden of proof remains the same despite the Government's having, as here, destroyed or withheld pertinent documentary evidence, this Court's holding that a defendant should not be "left entirely to reliance on Government testimony" 394 U.S. at 183, is easily circumvented.

Electronic surveillance is by nature surreptitious. Unless they encompass the issues of standing and legality, the discovery and testing rights granted in *Alderman* are virtually meaningless as a means of insuring taint-free prosecutions.

4. Collateral Estoppel Effect of Ninth Circuit Holding That Telephone Company Monitoring Violated Petitioner's Rights

At issue here is whether to let stand the Tenth Circuit's affirmance of a denial of a motion to suppress fruits of certain telephone company monitoring of calls between Nolan and one Alvin Bubis. The affirmance was on the ground that Nolan had failed to establish the illegality of the telephone company monitoring and disclosure of these conversations. (17a-19a.)

On January 15, 1970, upon an appeal by the Government in *United States* v. *Nolan* (29a), the Ninth Circuit affirmed the order of the United States District Court for the Central District of California (27a-28a) in litigation between these same parties, suppressing these very monitorings and all evidence derived therefrom, as unlawfully obtained in violation of 47 U.S.C. § 605. When the Government failed to petition for certiorari, that judgment became final and binding on both parties. The determination that the monitoring violated Nolan's rights under § 605 is thus binding upon the United States under the principles of collateral estoppel and *res judicata*. See *Gaitan* v. *United States*, 295 F.2d 277 (10 Cir. 1961); *Laughlin* v. *United States*, 344 F.2d 187 (D.C. Cir. 1965). The binding effect of that judgment is mandated by the double jeopardy clause of the Fifth Amendment, *Ashe* v. *Swenson*, 38 U.S.L.W. 4295, 4297 (1970).

These monitorings occurred during the period covered by the indictment, and were disclosed to the Government approximately two months before the grand jury investigation began in June, 1966. See *Bubis* v. *United States*, 384 F.2d at 645. Although the tapes themselves were not introduced at trial, the prosecu-

tor's opening and closing statements indicate strongly that leads from them were used in building the Government's case against Nolan. (A. 875-76, 1251; see also A. 234-35, 616-17, 936-44, 1088-1107, 1111-26, 1134-45, 1182-94; 23a-24a.)

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1969 TERM

No. 9,730

EUGENE ANTHONY NOLAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(District Court No. 14406 Cr.)

JAMES L. GUILMARTIN and STANLEY JAY BARTEL (GUY JOHNSON, ROBERT RIZLEY, ADDISON M. BOWMAN, with them on brief) for Appellant.

K. ERIC GISLESON and EDWARD T. JOYCE, Department of Justice (WILL WILSON, Assistant Attorney General, and GERALD E. MCDOWELL, Department of Justice, with them on brief) for Appellee.

Before MURRAH, Chief Judge, PHILLIPS and HILL, Circuit Judges.

MURRAH, Chief Judge

Defendant Nolan was convicted at jury trial for conspiracy to use and the actual use of facilities in interstate commerce to carry on an unlawful gambling business in violation of 18 U.S.C. §§ 371 and 1952. On appeal, Nolan challenges the practices employed in the selection of the jury venire; the incriminating use of his federal wagering tax stamp; the prejudicial admission of the federal wager-

ing tax stamp of his co-conspirator, Dale Hines; surveillance to obtain incriminating evidence; and asserts the compromise of his Fifth Amendment right to remain silent in order to support his Fourth Amendment motion to suppress; insufficiency of the evidence; prosecutorial misconduct; and improper sentencing.

I. Challenge to the Venire

While not attacking the key man system employed in the Northern District of Oklahoma at the time of our case as illegal per se or intentionally discriminatory, Nolan does claim that the system had the operational effect of discriminatorily excluding lower educational and income groups and racial minorities. He contends that the key men or suggesters selected by the jury commission were not representative of a cross section of the community and that the instructions in the letter sent to them to use their "own good judgment" to select "good citizens" as prospective jurors added additional qualifications found and condemned in Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) and Witcher v. Peyton, 405 F.2d 725 (4th Cir. 1969), and that, in any event, he was denied a fair evidentiary hearing upon these claims.

It is settled beyond doubt that the constitutional fair- and impartial-jury guaranty does not require that every economic, racial, or ethnic class shall be represented on every jury venire or panel. What it does require is that no such group shall be discriminatorily excluded. Consistent lack of proportional representation on the jury list may very well be cogent evidence of systematic exclusion. See Smith v. United States, 311 U.S. 128 (1940); Glasser v. United States, 315 U.S. 60 (1942); Fay v. New York, 332 U.S. 261 (1947); Hernandez v. United States, 347 U.S. 475 (1954); Swain v. Alabama, 380 U.S. 202 (1965); Rabinowitz v. United States, supra; Bary v. United States, 248 F.2d 201 (10th Cir. 1957).

Since it is conceded that the so-called key man system is not per se discriminatory, our inquiry is whether the methods and practices employed were discriminatorily utilized here. Upon motion to quash the jury list, the court conducted a pretrial hearing in which the jury commissioner and court clerk described and explained in detail the method and manner in which the key men or suggesters were selected as well as the instructions given to them on how the prospective jurors were to be chosen.

These methods and practices may be summarized as follows: Every three or four years the court clerk sent letters asking for suggested names of possible jurors to all postmasters in the district, civic and professional clubs, each and every church listed in the telephone directory, labor unions and county agents of each county in the district. Other groups were contacted by telephone and the clerk also traveled to many towns in the district to "secure names from various groups that would represent a cross-section of the prospective jurors and as to the population and as to their occupation and as to the color and race . . ." Sometimes suggestions were made by the jury commissioners themselves, federal judges, their law clerks, and other federal employees.

When the suggested names were received, an administrative office questionnaire was sent to each prospective juror, asking for the usual biographical information and inquiring about any criminal record and the ability to read and write. See 28 U.S.C. § 1861. Race, religion, and economic status were not mentioned. When the questionnaires were returned, they were examined for juror disabilities and only statutory disqualifications were made.

The challenged instruction in the letter stated simply that the prospective jurors "should be good citizens and representative of the various interests in the community . . . . Please use your own good judgment." (R. 1327)

There is certainly nothing in this record from which it can be said that the suggesters did not fairly represent a

cross section of the community. On the contrary, the organizational and group identity of many of the suggesters is strongly indicative of their heterogeneity. Nor do we find anything in the instructions which can be construed to authorize the suggesters to set up their own standards for juror qualifications. Considered in the context in which the instructions were given, we believe they are susceptible to only one admonition, i.e., that the suggesters should use their best judgment in the selection of prospective jurors whom they believe to be fairly representative of the citizenry of the community in which they live. There can be no objection to the admonition to select good citizens so long as they are fairly representative of the community and this language was obviously intended to and did say no more. Cf. Hunt v. United States, 400 F.2d 306 (5th Cir. 1968); Rabinowitz v. United States, supra; Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

Nolan insists, however, that had he been permitted to do so, he could have shown by the testimony of the suggesters themselves that they construed their instructions to authorize them to exercise their "own good judgment" concerning qualifications in selecting "good citizens" as prospective jurors and thus establish their own standards without regard to statutory or constitutional requirements. Purposeful discrimination may not be assumed or merely asserted, i.e. see Swain v. Alabama, supra. It was incumbent upon Nolan to make some factual showing of racial, educational or economic disparity in the jury list as a basis for the interrogation of the suggesters concerning their interpretation of the instructions to use their best judgment to choose "good citizens" representing the various interests of the community. See Hunt v. United States, supra, distinguishing Rabinowitz v. United States, supra. In his motion to quash, Nolan asserted only conclusions of law without supporting affidavits, statistics or factual allegations showing any disproportionate representation or any irregularities in the practices used. At

the outset of the evidentiary hearing the trial court cautioned Nolan's attorneys that "the Court is going to look to you for proof, with evidence of some support of these allegations and will determine by such proof and evidence how far this court will go into the hearing in depth." After hearing testimony from the court clerk, deputy clerk, and jury commissioner for over two days, which revealed no significant irregularities of any kind, the court ended the hearing. When counsel attempted to resort to the jury list apparently for the purpose of making a prima facie showing of racial or economic disparity, the trial court very properly suggested that the jury lists had been available to counsel for four months without any statistical or other factual data tending to show disproportionate representation. We think the trial court quite properly declined to permit counsel to launch what can only be called a fishing expedition.

II. Incriminating Use of Nolan's Tax Stamp

Nolan's second claim is that the government's use of his federal wagering tax stamp filings at trial violated his Fifth Amendment privilege against self-incrimination. And see Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969); Covington v. United States, 395 U.S. 57 (1969); United States v. Freeman, 412 F.2d 1180 (10th Cir. 1969). Under the controlling rationale of these cases Nolan's tax stamp filings were compelled self-incriminatory statements and a properly asserted claim of privilege would shield him from criminal penalties for failure to comply with the tax laws on wagering. Marchetti, 390 U.S. at 48; Leary, 395 U.S. at 27. Since then it has become clear that introduction of evidence of these filings at defendant's trial on charges of violation of 18 U.S.C. §§ 371 and 1952 would also have subjected defendant to a "real and appreciable risk" of self-incrimination. And see United

States v. Freeman, supra; Nolan v. United States, 395 F.2d 283 (5th Cir. 1968). The filings were not, however, formally introduced into evidence and the question is whether the oblique references that were made to them were sufficient to create the required risk of self incrimination and to entitle defendant to claim his Fifth Amendment privilege.

Defendant's possession of a tax stamp was referred to by the court and counsel for both sides and testified to by defendant's brother, Dr. Charles Nolan. The indictment listed the defendant's holding of a wagering tax stamp as one of the overt acts under the conspiracy count and this was read to the jury, without objection, by the court.

The central reference to the stamp came from defendant's brother, Dr. Nolan, who volunteered on both direct and cross-examination that one of his reasons for considering his brother a professional gambler was his possession of a wagering tax stamp. Dr. Nolan mentioned other reasons for his opinion but always returned to the stamp. On cross-examination, he said, "He owned these gambling establishments and or he backed them rather, and he had a gambling stamp. That's what I mean." Several questions later he reiterated "So, consequently, anybody that holds a gambling stamp, in my opinion, is a gambler, and if you hold a gambling stamp, I think, in the public's eye you are considered a professional gambler and this is what I was pertaining to before the Grand Jury." (R. 1030) No objection was made to any of this testimony.

Dr. Nolan's testimony was referred to by both sides in argument to the jury and the government emphasized it in its summary of the evidence. In its argument, the defense rhetorically asked the jury why the stamp had not been introduced and, in closing, the government explained its absence as an effort to avoid possible error under cases then pending in the Supreme Court. See Marchetti, 390 U.S. at 41, n. 7. Finally, the court devoted one sentence

of its charge to the tax stamp issue, stating that possession of a wagering tax stamp did not excuse violations of state gambling laws. Counsel for Nolan felt this reference was unnecessary but did not object.

Considering these references to defendant's tax stamp both for their individual and cumulative effect in the course of a four-day trial, we must conclude that sufficient reference was made to subject defendant to a substantial risk of self-incrimination. The privilege may be violated in other ways than by introduction of the self-incriminatory statements, Chapman v. United States, 386 U.S. 18 (1967), and there was a real danger here that these references might become "a significant 'link in a chain' of evidence" tending to establish Nolan's guilt. Marchetti, 390 U.S. at 48.

Although the references to Nolan's tax stamp were sufficient to entitle him to claim the Fifth Amendment privilege it was incumbent upon him to make a timely and proper assertion of the privilege. Marchetti, 390 U.S. at 61; Haynes, 390 U.S. at 100; Leary, 395 U.S. at 27; Covington, 395 U.S. at 59-61; Freeman, 412 F.2d at 1184. As we have seen, no assertion of the privilege was made in the trial court. The issue is first raised on appeal. Nolan seeks to excuse his failure to raise the privilege on the rationale of Grosso. In that case, the Supreme Court excused a defendant's failure to raise his privilege as a defense to an occupational wagering tax prosecution since United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955) were still good law at the time of his trial. Because there was no evidence of waiver other than the failure to assert the privilege and because the defense of privilege would prevail in the trial court, the Court reversed the judgment in its entirety. Grosso, 390 U.S. at 71-2.

We think our case differs from Grosso because, in our situation, Nolan's counsel was aware that the availability

of the privilege under these circumstances was being actively litigated and he was thus charged with a duty to anticipate a favorable decision and to make his record accordingly. A review of the chronology of the events leading to trial of this case demonstrates defense counsel's knowledge of the likelihood of the availability of the privilege.

On March 2, 1966, the Supreme Court granted certiorari in the case of Costello v. United States, 383 U.S. 942 (1966), limited to the following issues:

> "1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), overrule United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955)?"

On October 10, 1966, certiorari was granted in Grosso v. United States, 385 U.S. 810 (1966). On January 9, 1967, after Costello's death, the Supreme Court granted certiorari in the case of Marchetti v. United States, 385 U.S. 1000 (1967), limited to the same issues as in Costello. On January 17 and 18, 1967, the Court heard argument in both the Grosso and Marchetti cases.

Four months later, on May 25, 1967, at the trial of defendant the prosecution introduced into evidence the wagering tax stamp and tax filings of Dale Hines, the alleged co-conspirator with Nolan. Defense counsel objected to their introduction because of the two cases then pending in the Supreme Court which, in counsel's words, raised the question "whether or not this manner of proving a man a gambler is constitutional or not. Whether or not he is being forced to admit that he is a gambler. This is a

question before the Supreme Court which may be decided at any moment." (R. 1014-15)

It is thus quite apparent that both sides tried this case in the shadow of Marchetti and Grosso and their probable consequences. The government, aware of the possibility of error in introducing the stamp, was not disposed to offer it formally into evidence; instead it sought to bring the stamp before the jury by way of references to it in testimony and argument. It may be that the defense was hopeful that the government might formally introduce or make more direct references to the stamp, laying the ground for error depending on the outcome of Grosso. This strategy is indicated by the closing argument, asking the jury why the stamp had not been introduced and provoking a further reference and explanation of its absence from the Government. For purposes of our case, it is sufficient to say that the failure to assert the privilege sometime during the trial of the case can be plausibly attributed to calculated trial strategy. In the circumstances, we conclude that its assertion for the first time on appeal is too late and the privilege is deemed to have been waived.

III. Alleged Denial of Confrontation and Cross-Examination

Nolan makes brief reference to the admission of Hines' tax stamp filings, contending for the first time on appeal that they were hearsay and violated his confrontation and cross-examination rights under Douglas v. Alabama, 380 U.S. 415 (1965), and Bruton v. United States, 391 U.S. 123 (1968). In Douglas, a convicted co-defendant whose appeal was pending invoked the privilege against self-incrimination when called by the prosecution. The prosecutor was then permitted to treat the co-defendant as a hostile witness and "[u]nder the guise of cross-examination to refresh [the co-defendant's] recollection, the Solicitor purported to read from the [confession of the co-defend-

ant], pausing after every few sentences to ask . . . in the presence of the jury, 'Did you make that statement?' Each time, [the co-defendant] asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read." Douglas, 380 U.S. at 416-17. The Court ruled that the Solicitor's recitations may have been equivalent to testimony by the co-defendant in the jury's mind and that Douglas' inability to cross-examine the co-defendant "to test the truth of the statement itself" denied Douglas his right of confrontation. Id. at 420.

In Bruton, a statement by a co-defendant inculpating Bruton was admitted as evidence against the confessor but the jury was instructed to disregard it as against Bruton. The co-defendant did not take the stand and was therefore not subject to cross-examination. The Supreme Court ruled that the instruction to disregard the confession was ineffectual and that the refusal of the co-defendant to testify robbed defendant of his constitutional right of confrontation and cross-examination.

The Hines' filings were obviously offered and admitted to prove the conspiracy count in the indictment, not the substantive offense. And, as we have seen, Nolan's objection went to the question of self-incrimination, i.e., "forcing him to admit that he was a gambler." When the court inquired whether Nolan had standing to object to admission of Hines' tax stamp filings, counsel replied, "He has standing to object to anything prejudicial in his case which is in fact establishing an element of conspiracy, to-wit: the fact that Hines, a co-conspirator, was in fact a gambler." (R. 1015) Liberally construed, we take it that the objection was intended to challenge the competency of the filings to prove an essential element of the conspiracy. There was evidence tending to show continuing telephonic communications between the Hines' place of business in Tulsa and Nolan's place of business in Baton

Rouge.[1] And there was record evidence that wagering activities were carried on contemporaneously at both places. On this predicate, the evidence was not objectionable hearsay, Pinkerton v. United States, 328 U.S. 640 (1948); but see also Fiswick v. United States, 329 U.S. 11 (1946), and was undoubtedly competent to prove the conspiracy, subject, of course, to the right of confrontation and cross-examination.

After the filings were identified and admitted and the Government's case was closed, Hines was called as a witness for the defense by Nolan and was asked, "[D]o you

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[1] During the period of the conspiracy fifty calls were made from the phone in Hines' place of business to Nolan's number in Baton Rouge. In addition there was record evidence that during the conspiracy period approximately 300 calls were received either by Nolan's number in Baton Rouge or Hines' number in Tulsa and charged to three different credit cards issued in fictitious names for the account of Gil Beckley and paid for by him. A former telephone company employee who obtained the credit cards for Gil Beckley testified that at one point users of one of the cards were transposing its numbers, making correct billing difficult. At Mr. Beckley's suggestion he called a "Gene" or "Eugene" in Baton Rouge to explain the proper use of the card for telephone accounting purposes. Only 4 of these calls were directly traced from either Nolan's exchange in Baton Rouge to Hines' number or vice versa. But approximately 195 of them were identified as originating in the city of Baton Rouge and going to Hines' number in Tulsa, or originating from the city of Tulsa and going to Nolan's number in Baton Rouge. The remainder of the 300 credit card calls were either to Hines' or Nolan's number from other cities around the country.

Records seized in a search of Hines' premises listed Nolan's Baton Rouge telephone number in juxtaposition with the number 19 and further identified the number 19 with so-called "bottom sheets", reflecting gambling transactions between Hines' place of business and number 19. A government expert was permitted to testify that in gambling transactions of this kind the names of "players or . . . agents" were frequently abbreviated by numerical designations known as codes. Under the instant instructions of the court, the jury was apparently left to infer whether Nolan was sufficiently identified with code number 19.

know Joe Rabino?" to which he pleaded the Fifth Amendment. His plea was ultimately sustained without Hines being examined in any manner.[2]

It may be conceded that Hines' filings are analogous to the inculpatory evidence in both Douglas and Bruton and

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[2] The record reveals the following:

"Q. Mr. Hines, do you know Joe Rabino? A. Your Honor, I take the Fifth Amendment.

* * * *

The Court: The Court can't compel Mr. Hines to testify if he doesn't desire to.

Mr. Rizley: Well, Your Honor, in the Fifth Amendment there are several provisions under the Fifth Amendment.

* * * *

The Court: There has been enough presented to the Court for my ruling.

* * * *

Mr. Rizley: There may be questions which could be posed to this witness which would not be answered by this witness insofar as his taking the Fifth Amendment. I believe the law is that—

[The witness was then recalled to find out if he was going to take the Fifth Amendment for the whole case whereupon the Court inquired:]

You have taken the Fifth Amendment in connection with a couple of questions put to you and counsel wants to ask you several other questions in connection with the defense of this case, as far as the defendant Eugene Nolan is concerned. The Court will inquire of you if you intend to take the Fifth on any and all questions that might be pertinent in this case.

The Witness: Yes, sir.

The Court: Very well.

Anything further, now?

Mr. Rizley: We have nothing further of this witness if Your Honor has so ruled.

The Court: All right. Call your next witness.

You may step down.

(Witness excused)

Mr. Guilmartin: The defendant rests, Your Honor."

consequently subject to the same Constitutional safeguards with respect to confrontation and cross-examination. And see Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968), prob. juris. noted, 393 U.S. 1076 (1969). And it may also be conceded that Hines' plea of the privilege operated to deprive Nolan of the right to confront and cross-examine Hines with respect to his filings and the use of his stamp. But, even so, it was surely incumbent upon Nolan to timely assert the right of confrontation and to complain of its denial. Cf. Douglas, 380 U.S. at 420 (Part II of the opinion).

When the filings were identified and offered in evidence and Nolan objected on the grounds of inadmissibility to prove the offense, he could not anticipate Hines' plea and therefore cannot be charged with a duty to assert the right of confrontation at that stage of the proceedings. But when the Government's case was in and Hines was called as a defense witness, his plea certainly apprised Nolan that he would be unable to examine him either directly or indirectly with respect to the inculpatory evidence, i.e., the tax stamp filings. There is nothing in the record to indicate that Hines was called for cross-examination or as a hostile witness and nothing to apprise the trial court of a claim that Hines' plea worked a deprivation of Nolan's constitutional right of confrontation. After the court had sustained the plea and the witness was excused, the defendant rested his case without moving for a directed verdict or mistrial or in any way complaining of a denial of confrontation. In these circumstances we hold that if the Hines' plea deprived Nolan of his right to examine or cross-examine Hines with respect to his tax stamp filings, the right was effectually waived by failure to complain of it after the fact.

IV. Electronic Surveillance

Defendant's fourth allegation of error is that the Government's evidence at trial was tainted by illegal electronic

surveillance of the defendant by the FBI, the IRS, and the Pacific Telephone and Telegraph Co. After alleging the existence of illegal surveillance in a pretrial motion to suppress (R. 14) the defendant was entitled to inspect all recordings and transcripts made of his conversations. Aldermann [sic] v. United States, 394 U.S. 165, 181 (1969). With exceptions to be noted later, the Government provided defendant with all relevant tapes. After inspecting this material, the burden was on the defendant to prove that an illegal electronic surveillance of himself had occurred. Nardone v. United States, 308 U.S. 338, 341 (1939). Once this initial burden is met, the ultimate burden of persuasion in showing freedom from taint and reliance on independent sources is on the Government. Id.; Cf. Chapman v. United States, 386 U.S. 18 (1967). At the same time defendant is required to "go forward with specific evidence demonstrating taint." Alderman v. United States, 394 U.S. at 183; Nardone v. United States, 308 U.S. at 141.

The defendant raised the issue of illegal surveillance twice in pretrial motions, first in a motion to suppress and later in motions to quash the indictment and to dismiss. On the first motion, after a hearing, the court suppressed thirty-five tapes made by the FBI and IRS but declined to suppress the tapes made by the telephone company. The court also found that no tainted evidence derived from the suppressed tapes was used in returning the indictment (though it is apparent the court was not convinced of the illegality of the tapes). The court also denied the motions to quash and to dismiss, after a second full hearing on the issue of illegal surveillance, holding that the defendant had failed to meet his initial burden under Nardone of showing illegal surveillance involving himself and never reaching the issue of taint except as to the IRS tapes.

In order to simplify our problem, we will discuss each category of allegedly illegal surveillance separately. The

first involves an alleged wiretap by Special Agent Owen Burke Yung of the IRS in Miami, Florida, in 1962. The tapes compiled by Yung were erased and reused and were unavailable to the defendant. However, Agent Yung testified that the phone he tapped did not belong to defendant and that he did not know of or participate in any illegal eavesdropping on this defendant. Defendant provided no evidence to support his assertions that his conversations were monitored and we conclude that he failed to prove he was the subject of surveillance by Agent Yung. A discussion of possible taint thus becomes unnecessary. See Fullbright v. United States, 392 F.2d 432, 435-36 (10th Cir. 1968), cert. denied 393 U.S. 830; United States v. Thompson, 409 F.2d 113, 117 (6th Cir. 1969); United States v. Masterson, 383 F.2d 610, 614 (2d Cir. 1967); Murray v. United States, 333 F.2d 409, 411 (10th Cir. 1964), vacated on other grounds, 380 U.S. 527 (1965); United States v. Desist, 277 F. Supp. 690 (S.D.N.Y. 1967), aff'd 384 F.2d 889 (2d Cir. 1967), aff'd on other grounds, 394 U.S. 244 (1969).

Defendant also alleged that IRS Agent Nauborn Perry conducted an illegal wiretap involving him in New Orleans in 1959. The tape of this surveillance could not be found, but a transcript was made available to the defendant. Nolan placed in evidence quantities of testimony from the trial of United States v. Lassoff, Crim. No. 28247, (E.D. La. 1962), in which he was a defendant in 1962 and at which the Perry tapes were played. Although the testimony was offered to show that defendant was the subject of this surveillance, it shows that the phone tapped was not defendant's and was not on defendant's premises. And Agent Perry did not identify defendant as one of those whose voice was recorded. The only evidence tying defendant to the tapes was the name "Gene" appearing in the transcript of the tape and defendant's testimony that he had recognized his own voice on the tapes at the

1962 trial. Under these circumstances, it was reasonable to reject Nolan's testimony and to find he had failed to prove his relation to the alleged wiretap.

We conclude that defendant has also failed to show the illegality of the FBI surveillance in 1964. Although these tapes were suppressed initially, the court reserved the question of their legality. (R. 525) In response to defendant's later motions to quash the indictment and dismiss, the court found the FBI installation to have been a legal eavesdrop. (R. 776) The FBI agent who installed the listening device testified at the first hearing that a contact microphone was applied to the walls of the hotel rooms adjoining defendant's and that no penetration had occurred. Under Goldman v. United States, 316 U.S. 129 (1942), such an installation was not illegal. The defendant claims that the subsequent case of Katz v. United States, 389 U.S. 347 (1967), rendered after defendant's conviction but during his appeal, makes the tapes illegal. But Desist v. United States, 394 U.S. 244 (1969), has held the Katz rule inapplicable to eavesdropping occurring prior to the date of the Katz decision. Since the FBI tapes were made prior to Katz and the method of obtaining them was acceptable under Goldman, Katz is inapplicable.

The fourth category consists of tapes made by the IRS of the defendant in two different locations in 1964. These tapes were made by wall-penetrating devices and we think their illegality under Goldman v. United States, supra, was sufficiently established by the testimony of the agents who installed them. It is also clear that defendant was a subject of surveillance. We think, however, the Government has shown that its case was free from taint resulting from this surveillance. The testimony of the agent in charge of the surveillance and the playing of one tape in court showed that nothing of value could be derived from these tapes. In these circumstances, we do not think the failure of the Government to produce one of the six tapes was

so serious as to require a further hearing. Nor do we think it was error for the lower court to refuse to allow defendant to improve the sound quality of the IRS tapes when the Government filed an affidavit and the recording officer testified that the tapes were in their original state and that no effort had been made to improve their quality.

The final category of electronic surveillance is the tapes which were apparently made by Pacific Telephone & Telegraph Co. as part of an investigation of illegal use of its long distance lines. The defendant attempts, in his brief, to tie together these tapes, similar telephone monitoring by the Southern Bell Telephone Co. in Louisiana, and telephone monitoring by IRS Agent Nauborn Perry in Louisiana. There is no basis in the record to support this theory and we disregard it.

We must initially decide whether the court was correct in its finding of legality, remembering that the burden was on the defendant to prove illegality. Defendant first contends that the tapes were obtained in violation of the fourth amendment. Katz is the only basis on which the fourth amendment's protections might be extended to cover telephone monitoring (assuming government cooperation with the telephone company) and it is unavailable to the defendant, provided the tapes were secured in accordance with applicable legal standards (in this case 47 U.S.C.A. § 605 (1962), as amended, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351 (June 19, 1968)). See Desist v. United States, 394 U.S. 244 (1969).

The legality under § 605 of the use of telephone company monitoring records at trial has been upheld on several theories. The older theory is that illegal users of the telephone company's facilities are not entitled to the protection of § 605 for their communication. In Brandon v. United States, 382 F.2d 607 (10th Cir. 1967), we held that § 605 was not violated by the use of a telephone company's monitoring tapes to secure an indictment for violations of

18 U.S.C.A. §§ 371 and 1343 (1966) (conspiracy and actual transmissions of signals by wire in interstate commerce to defraud telephone company). We said there that § 605 was "adopted by Congress for the protection of authorized users of telephonic or radio facilities; it was not intended as a refuge for the wrongdoer who uses the telephone in a scheme to violate the wire fraud statute." Id. at 611. This interpretation rests both on implied consent to company attempts to bill the user properly, Id. at 611, and on judicial interpretation of the intended scope of the legislation. United States v. Sugden, 226 F. 2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916.

There is an equally convincing interpretation of § 605 upholding the use of the tapes against recipients, as well as senders, of illegal calls. The first clause of that section, unlike the second, permits the divulgence of communications intercepted in the course of employment in certain limited circumstances, including "in response to subpoena . . . or on demand of other lawful authority." The perpetration of toll frauds on the telephone company's direct dialing and billing machinery has required monitoring of telephonic lines by employees to detect the illegal users and to fulfill the company's statutory duties to the Government and to its customers. Hanna v. United States, 404 F.2d 405 (5th Cir. 1968). The monitors may be considered employees within the first clause and it is our opinion that divulgence in the manner outlined there is not impermissible. Because of our reading of the first clause of § 605 we need not consider the alternate theory that telephone monitoring by the company to detect toll frauds constitutes an implied exception to the second clause of § 605. See Bubis v. United States, 384 F. 2d 643 (9th Cir. 1967).

The only question under this theory is whether the company monitoring was disclosed in the manner required by § 605. The record reveals that the tapes were subpoenaed

for this trial from another court where they had been introduced into evidence. There is no evidence in the record as to the manner of original disclosure of this information to the Government. As we have seen, the defendant has attempted in his brief to show cooperative monitoring by the Government and phone company. The record references in defendant's brief are to the trial record of United States v. Lassoff, Crim. No. 28247 (E.D. La. 1962) and have no apparent bearing on the tapes in question. There was no attempt here to trace the origins of these tapes by interrogatories or otherwise. In the absence of evidence from the defendant as to the manner of original disclosure by the telephone company, we must hold that Nolan has failed to satisfy his burden of showing illegality under Nardone. The absence of evidence as to the circumstances of the telephone company's disclosure distinguishes this case from Bubis v. United States, 384 F.2d 643 (9th Cir. 1967), where the court held tapes apparently resulting from the same surveillance inadmissible.

Nolan also argues that use of telephone company toll records at trial and before the Grand Jury to show calls between his phone and Hines' were in violation of the fourth amendment and 47 U.S.C.A. § 605 (1967). We fail to see how the fourth amendment is applicable to the keeping of telephone company records. There is no suggestion that these records represent anything other than records normally kept in the ordinary course of business on all customers' phones. No showing of government involvement in the keeping of these records has been made. Burdeau v. McDowell, 256 U.S. 465 (1921); and, as we have noted, Desist makes the Katz rule inapplicable to these records insofar as it applies the fourth amendment to electronic surveillance.

The § 605 objection is based on the assumption that these toll records were divulged to the government by the company in violation of the first clause of that section or were obtained by interception and divulgence contrary to the

second clause. The trial court apparently admitted the records under the rationale of United States v. Gallo, 123 F.2d 229 (2d Cir. 1941), which rejected a similar claim of illegal divulgence and interception under the second clause. We agree that the second clause does not prohibit the use of these records.

Assuming the applicability of the first clause of § 605 to these records, Di Piazza v. United States, 415 F.2d 99 (6th Cir. 1969), petition for cert. filed, 38 U.S.L.W. 3342 (U.S. Dec. 17, 1969); Contra, United States v. Covello, 410 F.2d 536 (2d Cir. 1969), cert. denied, 38 U.S.L.W. 3141 (U.S. Oct. 20, 1969), rehearing denied, 38 U.S.L.W. 3321 (U.S. Feb. 24, 1970), the burden was on Nolan to show that they were disclosed in a manner violative of that clause. Nardone v. United States, supra. The record plainly shows that these toll records were produced in court pursuant to subpoena duces tecum but is silent as to the manner in which the existence of these records first came to the attention of the government. As we said in connection with the disclosure of the telephone company tapes, in the absence of some evidence of illegal divulgence or interception it is enough that they were produced "in response to a subpoena of a court of competent jurisdiction." 47 U.S.C.A. § 605.

Since we have decided that Nolan failed to prove the illegality of the use of the toll cards or telephone company tapes, we may summarily dispose of his objection to the trial court's denial of access to the names and testimony of the Grand Jury witnesses for the purpose of proving taint. In any event, Nolan's desire to show that tainted evidence had reached the Grand Jury did not constitute a "particularized need." United States v. Procter & Gamble, 356 U.S. 677 (1958); Dennis v. United States, 384 U.S. 855 (1966); United States v. Melton, 398 F.2d 321 (10th Cir. 1968). This situation is clearly distinguishable from Government refusal to give a defendant access to records of

electronic surveillances involving him. See Kolod v. United States, 390 U.S. 136 (1968).

Nolan's final claim on this subject is that he was denied a full hearing on the matter of illegally obtained evidence and that the trial court's action violated the standards set forth in Nardone v. United States, 308 U.S. 141 (1939); Kolod v. United States, supra; and Alderman v. United States, 394 U.S. 165 (1969). The scope of the adversary hearing required by Alderman and Kolod was more closely defined in the recent case of Taglianetti v. United States, 394 U.S. 316 (1969). In holding that the trial court properly doublechecked government records *in camera* to be sure that all records containing defendant's voice were turned over to him the Supreme Court stressed, "Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance . . . . Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files." Id. at 317. And see United States v. Alderisio, —— F.2d —— (10th Cir. 1970).

The trial court devoted approximately eight days to a pretrial conference and hearing involving illegal wiretaps and eavesdropping. Testimony was received from nine witnesses, including the FBI and IRS agents who installed the equipment producing these tapes, the special agent in charge of the FBI in Oklahoma, the Oklahoma IRS agent in charge of the investigation, and IRS Agent Yung who allegedly wiretapped Nolan in Miami, Florida. The defendant was given the opportunity to listen to all tapes produced by the Government, to transcribe relevant portions of the tapes, and to make copies of certain of the tapes. In spite of all this, defendant was unable to prove the illegality of some of the surveillances or that others involved him. In the absence of such proof by the defendant, the trial court was acting within its discretion in end-

ing the adversary hearing where it did, especially where the Government made a strong affirmative showing of legality and immateriality.

V. Alleged Compromise of Fifth Amendment Rights

At the hearing on his motion to dismiss Nolan sought to testify that the allegedly illegal Perry tapes previously discussed contained his voice. Prior to that testimony, the court had warned him that any statement he made could be used against him. Nolan now suggests that this warning was "the kiss of death", requiring reversal under Simmons v. United States, 390 U.S. 377 (1968). In Simmons, the defendant testified in support of a motion to suppress that he owned an item which had been seized by the police and found to contain incriminating evidence. The motion to suppress was denied and the defendant's testimony was later used against him at trial. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394. The ownership testimony was "an integral part" of his fourth amendment claim because it gave the defendant standing to contest the police seizure of the item and the Court held this testimony inadmissible against him at trial on the issue of guilt, unless he made no objection. But we do not think reversal is justified where, as here, it is clear that the warning did not prevent the defendant from testifying fully and that no use was made of the testimony against the defendant at trial. It is clear beyond doubt that Nolan's fifth amendment rights, unlike Simmons', were not compromised in any way.

VI. Incompetent Prejudicial Evidence and Prosecutorial Misconduct

It is suggested that evidence associating Nolan in the conduct of gambling activities with Gil Beckley, who was neither a co-conspirator nor named in the bill of particulars, was incompetent and prejudicial error and that

the trial court should have sustained defendant's motion for mistrial.

In accord with the rule announced at the beginning of trial as to identification of exhibits, a great number of exhibits were identified for the record; some were ultimately admitted over defense objections; some were withdrawn on motion of the prosecution without having been admitted in evidence or shown to the jury. Three exhibits tending to associate Beckley and Nolan in gambling activities were withdrawn without the jury having seen them.[3]

As we have seen (Footnote 1), the Government's evidence associated Gil Beckley with the Nolan-Hines transactions through the use of the Beckley telephone credit cards. The three fictitious credit cards issued to Beckley's account and the summaries of the calls charged to these cards and paid for by Beckley, 2000 of which were charged to one card—Tulsa Manufacturing Co., were introduced over defense objections. Among these calls were the approximately three hundred calls which were received at either Hines' number in Tulsa or Nolan's number in Baton Rouge.

Cross-examination established that the government witness who made the summaries had investigated Beckley's gambling activities and that in connection with this investigation ten or twelve people in different parts of the country had also been investigated and that these ten or twelve persons had been identified "as suspected people" whose "names were known." The witness was specifically asked to state just the number and not the names of these persons. On redirect the witness was asked to state the names and occupations of those ten or twelve persons.

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[3] Government exhibits 91, 103 and 104, seized in a search of Gil Beckley's premises, were withdrawn on motion of the prosecution and the jury was so instructed. By these exhibits the Government had hoped to prove that Nolan and Beckley engaged in large gambling transactions together.

Over defense objections the witness was permitted to name the persons and to state that each was a known gambler on the grounds that it was proper redirect "in as much as you brought it up."

The defendant thereupon moved for a mistrial on the grounds that Beckley and three others had been recently convicted and sentenced in Miami and that the fact had received widespread notice and that Beckley had been identified as a "kingpin" in the gambling business. The court observed that in the first place there was nothing in the record to indicate that Beckley's conviction as a "kingpin" gambler had in any way been brought to the attention of the jurors, but that even so, Beckley's conviction did not exonerate Nolan. The court's final ruling was to the effect that although the indictment was confined to the Nolan-Hines transaction to and from Baton Rouge and Tulsa, it was competent to show their connection with other gambling activities and that the Beckley credit card transactions were competent for that purpose.

We agree with the trial court that the Beckley credit card transactions were competent proof of the alleged conspiracy. Nor can we say that in the context of the case the defense counsel did not open the door wide enough to justify the identification of the 10 or 12 persons whose names were associated with the Beckley credit card arrangement. See Kayser v. United States, 394 F.2d 601 (8th Cir.); and cf. United States v. Corrigan, 168 F.2d 641 (2nd Cir.). Certainly we cannot say that the trial court abused its discretion for the sake of completeness.

Nolan charges the government prosecutor with misconduct in promising in his opening statement to prove the professional status of Nolan's gambling activities by connecting him with another alleged gambler, i.e. Beckley, then failing to produce such proof and failing to correct any impression of such a connection. He also contends that evidence which was identified only as the product of

a search of Beckley's premises and never further explained or passed to the jury before being withdrawn might have been erroneously interpreted by the jury as proof of the initial promises. This situation clearly differs from Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965), where the misleading effect of the prosecutor's introductory remarks concerning the significance of evidence actually introduced as proof of the defendant's guilt was never corrected. Here the prosecution said it would prove certain facts but failed to do so after an adverse trial court ruling and subsequently noted the failure in its closing argument (as indeed did defense counsel). Any possible confusion created by the unfulfilled statement was thus corrected. We also reject Nolan's theory that the evidence identified and withdrawn without ever being presented to the jury could have misled or confused them, especially after the closing statements by both sides.

VII. Insufficiency of the Evidence

Considering all of the evidence in the light most favorable to the prosecution, O'Neal v. United States, 240 F.2d 700 (10th Cir. 1957); Collins v. United States, 383 F.2d 296 (10th Cir. 1967); Osborn v. United States, 391 F.2d 115 (10th Cir. 1968), including the references to Nolan's tax stamp, we think there was ample evidence to support the jury's verdict. We reject Nolan's claim of insufficiency. As to the conspiracy count, we think the "circumstances, acts and conduct of the parties" support the conclusion that an unlawful agreement existed. Jones v. United States, 251 F.2d 288, (10th Cir. 1958); Jones v. United States, 365 F.2d 87 (10th Cir. 1966); Jordan v. United States, 370 F.2d 126 (10th Cir. 1966).

VIII. Consecutive Sentencing

Nolan's final contention is that it was improper for the trial court to sentence him to consecutive sentences for violation of § 1952 and conspiracy to violate § 1952 because

these offenses are within the exception to the prosecution's normal right to charge both a substantive offense and a conspiracy and because the consecutive sentences are double punishment for a single crime.

The exception to the general rule that conspiracy is a different offense from the substantive crime involves "crimes that cannot be committed except by the concerted action of at least two persons, and of such a nature that the immediate effect of their consummation reaches only the participants therein, so that the conspiracy to commit them is in such close connection with the objective offense as to be inseparable from it." Curtis v. United States, 67 F.2d 943, 947 (10th Cir. 1933). Violation of § 1952 is obviously not within this exception.

We also reject Nolan's contention that consecutive sentences constitute double punishment for the same crime. The test of the identity of offenses is "whether each crime requires proof of a fact or element not required by the other." United States v. Doherty, 193 F.2d 487 (10th Cir. 1951). The test does not turn on the identity of evidence actually produced on both counts, but on whether the same evidence is required to prove the two offenses. Beacham v. United States, 218 F.2d 528, 529 (10th Cir. 1955); Doherty v. United States, 193 F.2d 487 (10th Cir. 1955). The fact that the acts constituting the substantive offense also may be pleaded and proven as acts done in furtherance of the conspiracy is not determinative of their identity. See Blockburger v. United States, 284 U.S. 299 (1932); Harris v. United States, 359 U.S. 19, 23-4 (1959); Eveling v. Warden, 237 U.S. 625 (1915); Carter v. United States, 333 F.2d 354 (10th Cir. 1964); Jordan v. United States, 370 F.2d 126 (10th Cir. 1966). Accordingly, it was permissible for the trial court to impose consecutive sentences for the conviction.

JUDGMENT AFFIRMED

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 36276-CD
No. 36269-CD
No. 36266-CD and 36513-CD
No. 36267-CD and 36516-CD
No. 36270-CD
No. 36264-CD and 36515-CD
No. 36265-CD and 36514-CD
No. 36275.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

GILBERT LEE BECKLEY; THOMAS MILTON BOYD; FRANCESCO SABATO DENEGRIS; HERBERT KAUFMAN; HENRY LOMAN; EUGENE NOLAN; JOHN OWEN TYLER; and VIRGIL SALATHIEL, *Defendants*.

Order

These matters having come before the Court upon defendants' motions to suppress evidence consisting of telephone conversations of defendants which were tape recorded, and motions to dismiss the indictments, and the Court having considered as evidence on said motions the

stipulations of plaintiff and defendants filed herein, and the Court finding that said tape recordings were unlawfully obtained,

IT IS HEREBY ORDERED that said telephone tape recordings are ordered suppressed in each of the following cases:

United States v. *Kaufman*, No. 36516
United States v. *Nolan, et al*, No. 36515
United States v. *Tyler, et al*, No. 36514
United States v. *De Negris, et al*, No. 36513
United States v. *Boyd, et al*, No. 36269

IT IS FURTHER ORDERED, on the representation of plaintiff that said suppressed telephone tape recordings constitute virtually all of the evidence against each defendant in the above-listed cases, that the indictments in each of said cases is dismissed.

It is understood by the Court, plaintiff and defendants that nothing contained in the stipulations of fact filed in the above-listed cases shall be binding upon the parties in the event of a reversal and/or remand upon an appeal from the orders herein suppressing evidence and dismissing the indictments.

On motion of plaintiff, United States of America, the following indictments are dismissed in the interests of justice:

United States v. *Beckley et al.*, No. 36276
United States v. *Salathiel*, No. 36275
United States v. *Loman*, No. 36270
United States v. *Kaufman*, No. 36267
United States v. *De Negris*, No. 36266
United States v. *Tyler*, No. 36265
United States v. *Nolan*, No. 36264

DATED THIS 27 day of January, 1969.

ALBERT LEE STEPHENS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24,040

UNITED STATES OF AMERICA, *Appellant*,

v.

HERBERT KAUFMAN, *Appellee*.

No. 24,032

UNITED STATES OF AMERICA, *Appellant*,

v.

EUGENE A. NOLAN, *Appellee*.

No. 24,031

UNITED STATES OF AMERICA, *Appellant*,

v.

JOHN OWEN TYLER, *Appellee*.

No. 24,030

UNITED STATES OF AMERICA, *Appellant*,

v.

THOMAS MILTON BOYD, *Appellee*.

No. 24,000

UNITED STATES OF AMERICA, *Appellant*,

v.

FRANCESCO S. DE NEGRIS, *Appellee*.

Order

Before: MERRILL, ELY and KILKENNY, Circuit Judges.

Judgment affirmed on the authority of *Bubis* v. *United States*, 384 F.2d 643 (9th Cir. 1967).

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

March Term, 1970

No. 440-69

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

FELIX ANTONIO ALDERISIO, *Defendant-Appellant*:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Peter R. Taft, Los Angeles, California (Edward Bennett Williams and Steven M. Umin, Washington, D. C., and William H. Erickson, Denver, Colorado, of counsel, were with him on the brief) for Appellant.

James A. Clark, Denver, Colorado (Marvin R. Loewy and Jerome M. Feit, Department of Justice, Washington, D.C., were with him on the brief), for Appellee.

Before LEWIS, HILL and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

This appeal reaches us upon judgment entered below pursuant to a limited hearing ordered by the Supreme Court to determine both the existence and effect of illegally monitored conversations as bearing on defendant-appellant's conviction. We are thus asked by appellant to review the propriety of that hearing under the exactitudes of the Supreme Court's remand.

Appellant Alderisio was initially convicted in 1965 with two co-defendants[1] by a jury in the United States District Court for the District of Colorado of conspiracy to transmit murderous threats in interstate commerce, 18

[1] Co-defendant Ruby Kolod is deceased, and the petition for certiorari as to him was dismissed. Co-defendant Willie Israel Alderman was granted his motion to dismiss his appeal from the judgment of the court below.

U.S.C. §§ 371, 875(c); the court sentenced Alderisio to four and one-half years' imprisonment with fine of $7500. All three convictions were affirmed on appeal to this court, Kolod v. United States, 371 F. 2 983, and the Supreme Court denied certiorari, 389 U.S. 834. On petition for rehearing, the Supreme Court was informed and took original notice of the claim that petitioner Alderisio's conversations had been electronically monitored by the F.B.I. on his business premises in Chicago [2] prior to and during the Denver trial. The Solicitor General responded that the Department of Justice disclaimed any arguable relevance of the recorded conversations to the case against the three defendant-petitioners. Denying the validity of the government's *ex parte* determination of the relevance question, the Court remanded and held that an adversary proceeding must be had to test the relevance of any unlawfully obtained conversations to the convictions. 390 U.S. 136 (per curiam). The Supreme Court subsequently formulated guidelines for hearing on remand when an opinion was issued on the government's motion to modify the Court's order. Alderman v. United States, 394 U.S. 165, 180-86. Reasserting the need for adversary proceedings on relevance, the Court directed the district court's hearing, findings, and conclusions

> (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through the surveillance. *Id.* at 186.

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[2] The Supreme Court's per curiam opinion, *infra*, did not specify the number or names of the locations. Four monitors were, in fact, installed; and two of these, located at Celano's Tailor Shop and the Armory Lounge, by agreement of counsel were not involved in the lower court's hearing. The two locales at issue below and on appeal were the Gaylur Mercantile Company and the First National Mortgage Company.

Accordingly, an exhaustive evidentiary hearing was conducted before the United States District Court for the District of Colorado on June 18, 19, and 26, 1969. Six weeks prior thereto the government furnished appellant's counsel with the "logs," or the F.B.I.'s distilled, partly-verbatim transcripts, of the conversations in which Alderisio participated which were taped during the surveillance of the four Chicago locations[3] over the two-year period preceding the date of appellant's 1965 conviction. None of the original tapes was preserved.[4] At hearing the court further ordered turnover on appellant's motion of all the "logs" covering Gaylur and First National upon its ruling that Alderisio properly claimed standing thereto. Defense counsel were additionally furnished excerpts from "airtels"—F.B.I. interoffice memoranda compiled largely from the original tapes and "logs." These reproduced "airtels" contained conversations not noted in corresponding "logs." In part, the court below found and concluded that the turnover was complete as to Alderisio, that no relevance of the conversations to the conviction was shown or attempted to be shown,[5] and that no fourth amendment taint was revealed to the evidence originally supporting Alderisio's conviction. A new judgment was entered imposing the same sentence, and appellant brought this appeal.

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[3] *See* note 2 *supra*. The Gaylur Mercantile Company was monitored between March and November 1963; the First National Mortgage Company, between October 2, 1964, and April 7, 1965.

[4] Parenthetically, one subject of the Court's remand order and the issue on appeal—what satisfies turnover—was reached only because the tapes themselves were not available for disclosure. The question will hopefully be confined to these and related proceedings with the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(8)(a), requiring all recordings made pursuant thereto to be retained for ten years.

[5] The trial court's finding no. 8 reads:

> . . . the defendants, although directed to by the Court on at least six different occasions, have been unable to designate any of the material turned over to them as having any relevancy to the prosecution and convictions of these defendants.

The primary theory of relief urged by Alderisio compels the sensitive adjustment of a defendant's access to transcripts of unlawfully secured conversations with the government's need to preserve other investigative information in secrecy, as opposed to the tapes themselves which are unavailable here or the "logs" which in several instances did not contain monitored information revealed in "airtels." He argues that the government's asserted transfer of a complete record comprised of "logs," excerpts from "airtels," and one "airtel," does not satisfy the Supreme Court's disclosure requirement in *Alderman*. Alderisio contends that the government's turnover compliance with *Alderman* still rests on its word that the subject of electronic surveillance properly claiming standing has, in fact, received all pertinent records. No contest is urged with the lower court's determination on relevance of the records examined on hearing. Appellant thus asks for an intensified scrutiny of F.B.I. materials possibly germane to the inquiry directed by the Supreme Court: 1) the "airtels" issued over the period logged and 2) testimony from all government participants with authority over the Alderisio surveillance. We agree, but conclude that ~~an adversary~~ proceeding to probe the content of F.B.I. "airtels" is not necessary.

Unlike "logs," "airtels" more resemble investigative syntheses including excerpted conversations from tapes and "logs," hearsay information, and F.B.I. identifications of parties and transactions not disclosed in either tapes or "logs." These "airtels" are compiled either weekly or "periodically" and ~~forwarded to~~ Washington Headquarters and, occasionally, to branch offices. For example, the one "airtel" examined in full by the court and counsel was sent from Chicago to Denver, and one of the two officers in charge of the Denver investigation leading to Alderisio's conviction testified that it was the only "airtel" forwarded from the Chicago investigation.

The Court in *Alderman* pointedly cautioned that "[n]one of [its ruling] means that any defendant will have an un-

limited license to rummage in the files of the Department of Justice." 394 U.S. at 185. Moreover, the district court was charged to

> confine the evidence presented by both sides to that which is material to the question of the possible violation of a petitioner's Fourth Amendment rights, to the content of conversations illegally overheard by surveillance which violated those rights and to the relevance of such conversations to the petitioner's subsequent conviction. *Id.* at 186.

The Court, however, specifically disallowed judicial *in camera* determinations of "arguable relevance," *id.* at 182-83, as well as the *ex parte* government determinations condemned on petition for rehearing. 390 U.S. at 137. Therefore, judicial discretion under *Alderman* is counterpoised by a prior need for complete turnover before the relevance inquiry is explored. The court below found no relevance in the information obtained by the monitor to Alderisio's conviction, but erroneously denied defense requests for further examination of "airtels" on the ground that no showing of materiality was established by the requests. Absent the tapes or complete "logs" on the tapes, Alderisio is entitled to examine that portion of the Chicago "airtels" relating monitored conversations not transcribed in the "logs" if any there be.

These excerpts are all to which appellant is entitled, however. *In camera* proceedings to compare the "airtels" with the "logs" for possible additional conversations not present in the "logs" will satisfy the *Alderman* rule on disclosure. In its opinion the Court noted:

> [An *in camera* review of the records might be permissible] if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. 394 U.S. at 182.

And subsequent to its decision in *Alderman*, the Supreme Court in Taglianetti v. United States, 394 U.S. 316 (per curiam), ruled that *Alderman* was not contravened by *in camera* inspection of transcripts of overheard conversations "to identify only those instances of surveillance which petitioner had standing to challenge under the Fourth Amendment exclusionary rule and to doublecheck the accuracy of the Government's voice identifications." *Id.* at 317. In both *Alderman* and *Taglianetti*, the Court stressed that the trustworthiness or competence of the government or court were not suspect, but that *in camera* determination on relevance inadequately safeguarded the petitioners' fourth amendment rights. 394 U.S. 165, 184; 394 U.S. 316, 317. We remand only for initial *in camera* review to check the completeness of the "logs" against the less numerous "airtels" and emphasize that the court's screening is restricted to specification of monitored conversations, and no determination of relevance, "arguable" or otherwise, will be made *in camera*.

Our order of remand renders moot appellant's claim for production of notes taken by the F.B.I. agent in charge of the Chicago investigation. This witness testified that he had examined the "airtels" and "logs," that he had noted all information in the former not contained in the latter, and that all such information had been submitted to the court.

Alderisio's related claims of error involve *Alderman's* direction that a petitioner be allowed to explore the "existence" of pertinent records. *See* 394 U.S. at 186. He argues that the court below erred in denying his motion requiring the agent in charge of Alderisio in Chicago, August C. Kompff, to examine his files in order to determine whether or not the basis of any informational source was electronic surveillance if it was not designated as such.[6]

[6] Electronic surveillance is distinguished from all other informational sources by a "C*."

The Denver field agent and his Washington supervisor responsible for the files involving Alderisio's prosecution conducted such an examination of their Denver files and uncovered the one "airtel" produced at the hearing and found not relevant to the 1965 prosecution. Kempff, who had testified during the hearing, returned to Chicago before the expanded search of both the Denver and Chicago files was suggested, the standards of which were concededly met by the Denver agent and supervisor in examining their own files. Because of Kempff's then absence, the court ruled cross-examination on point untimely and dilatory. Although the possible duplication and dissemination of evidence produced by the Chicago investigation should be explored, *see* United States v. Stein, Crim. No. 2523 (C.D. Cal. May 21, 1969), the trial court's ruling was within the bounds of *Alderman*. Cumulative testimony demonstrated that the non-designated information in the Denver file did not originate from electronic surveillance. Not only did the Denver agent testify to this effect, but the Washington, D.C. Headquarters file was searched by the supervisor of the Denver investigation who testified that no information from a non-designated Chicago electronic source was communicated to Denver.

However, even if the "existence" question was adequately probed, Alderisio has persuasively argued that it was error not to have required the F.B.I. headquarters supervisor to whom the Chicago agent reported, John Leggett, to testify that no additional overhearings appeared in his records on the Alderisio investigation as part of the Organized Crime Unit. The headquarters files on Alderisio had been examined by the headquarters supervisor of the Denver-Alderisio effort, who testified below, in a manner endorsed by appellant whereby the agent traced the source of all Bureau information pertaining to Alderisio's prosecution. The Court in *Alderman* stated that a petitioner has "the right to cross-examine the appropriate officials in regard to the connection between these records

and the case made against him. . . ." in addition to "specified records of overheard conversations." 394 U.S. at 185. Appellant contends, then, that only Leggett could finally describe the extent Alderisio was investigated in this prosecution through overheard conversations, classified as such, and other information originating in overheard conversations beyond the four Chicago locations. *See* Batistrieri [sic] v. United States, 395 U.S. 710 (per curiam), *vacating* 7 Cir., 403 F. 2 472. Because the extent of dissemination is so critical to a possible fourth amendment claim, appellant on remand should be allowed to cross-examine Agent Leggett.

Finally, appellant argues that the trial court erred in ruling that no attorney-client relationship existed at the time of the monitoring between one Michael Brodkin and Alderisio based on Brodkin's association with counsel in charge of the joint defense. Alderisio had sought to prove that a sixth amendment right was violated by the government's overhearing a privileged conversation and called Brodkin to substantiate the existence of the relationship. The record discloses that Brodkin represented Alderisio before a Chicago commissioner on appellant's removal to Denver and reduction of bail; engaged additional counsel for the defense; at arraignment represented co-defendant di Pietto, acquitted below; and twice relayed messages from Alderisio to Kolod in Denver.[7] Under these circumstances the court's ruling was not in error.

The case is remanded for the limited purposes designated herein and the judgment is otherwise affirmed.

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[7] Brodkin's files, if relevant, were destroyed by fire in 1967.

The court did not, as appellant contends, base its finding on Brodkin's stricken testimony, which was ordered when appellant's counsel would not allow the government to see the contents of communications from one of Alderisio's attorneys. Appellant had attempted to use these letters solely to refresh Brodkin's recollection as to dates allegedly probative of the claimed attorney-client relationship, but objected to any further disclosure of contents based on the same privilege he was trying to raise.

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No. 268

In the Supreme Court of the United States

OCTOBER TERM, 1970

EUGENE A. NOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 423 F. 2d 1031.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. A petition for rehearing was denied on April 16, 1970. On May 1, 1970, Mr. Justice White extended the time for filing a petition for a writ of certiorari to June 15, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that, in the circumstances of this case, the reference to petitioner's wagering tax stamp did not violate his privilege against self-incrimination.

2. Whether the holdings in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, rendered inadmissible evidence seized before those decisions from two premises occupied by petitioner, under search warrants based on affidavits asserting interstate gambling violations and referring to his wagering tax stamp.

3. Whether petitioner had standing to object to use against him of evidence seized under two search warrants from the residence of a co-conspirator.

4. Whether petitioner had a fair hearing on possible taint from electronic surveillance and whether the government's evidence at trial was tainted by illegal electronic surveillance.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Oklahoma of using interstate facilities to conduct a gambling business in violation of 18 U.S.C. 1952 and of conspiracy to commit that offense. He was sentenced to imprisonment for four years and fined $10,000 on each count, the sentences to run consecutively.

The sufficiency of the evidence is not challenged. Petitioner and codefendent Leroy Hines were involved in illegal gambling in 1965 and 1966. The latter operated from premises in Tulsa, Oklahoma, and the petitioner primarily from an apartment in Baton Rouge,

Louisiana. Prior to trial, Hines pleaded nolo contendere.

Two employees of Hines testified that they took bets from him in Tulsa (A. 882–890, 894, 898–909).[1] Wagering tax returns filed by Hines also disclosed that he was in the wagering business from July 1965 through June 1966 (A. 1014–1015). Telephone toll records showed numerous long distance calls between Hines and petitioner, the latter being identified by his brother at the trial as a professional gambler (A. 913–924, 1093–1094, 1025–1026).

Search warrants executed in January 1966 at the Baton Rouge apartment (A. 1061–1065, 1076), and at a New Orleans apartment occupied by petitioner (A. 1041–1053) and in June and July, 1966 at the Tulsa premises (A. 945–952, 1081–1082) resulted in seizure of gambling records and paraphernalia (A. 1151–1163). When Hines was subsequently arrested, papers on his person indicated that he and petitioner had been wagering (A. 1003–1007, 1020–1022).

After a pretrial hearing, the district court ruled that the government's case against petitioner was not tainted by five electronic surveillances. It held that petitioner had not established standing to challenge surveillances by Internal Revenue Agents Perry in 1959 and Yung in 1962. Petitioner sought to prove he was the subject of Perry's surveillance largely by his testimony that he had recognized his voice on the same tapes when they were played at a previous trial at which he was a defendant (A. 735–749). His voice was

[1] References are to the appendix to petitioner's opening brief in the court of appeals.

not identified at that trial and the court refused to believe his present testimony seeking to acknowledge that he was the speaker (A. 776–778). The court refused to infer that Nolan was the subject of the 1962 surveillance because he was generally a prime subject of investigation at that time and the tapes contained conversations of a close associate. It accepted the testimony of Agent Yung that Nolan was not involved (A. 720).

On the basis of testimony from the agent who installed contact microphones (A. 318–325), the court held a third surveillance, by the FBI, to be legal (A. 776). It also held (A. 776), after hearing testimony from agents that the tapes of two IRS surveillances in 1964 were unintelligible (A. 325–344) and listening to part of them (A. 359–362), that the government had met its burden of disproving any taint from those surveillances.

ARGUMENT

1. The government did not, as petitioner seems to imply, rely on petitioner's wagering tax stamp in presenting its case against him. As the court of appeals points out, "[t]he central reference to the stamp came from defendant's brother, Dr. Nolan, who volunteered on both direct and cross-examination that one of his reasons for considering his brother as a professional gambler was his possession of a wagering tax stamp" (Pet. App. 6a; A. 1024–1032). Significantly, petitioner did not object to the reference despite his previous objection to introduction of Hines' stamps on the ground that *Marchetti v. United States*, 390 U.S. 39, and *Grosso v. United States*, 390 U.S. 62, were pending (A. 1014–1015). Instead, defense counsel in his closing

argument stressed the government's failure to introduce the stamp into evidence (A. 1227–1229). The government's brief reply, referring to the then pending Supreme Court cases, was proper (A. 1252). In these circumstances, the court of appeals correctly concluded that petitioner's failure to object to the reference to the stamp was a part of "calculated trial strategy." There is no suggestion in *United States v. Lookretis*, 398 F. 2d 64 (C.A. 7), upon which petitioner relies, that "calculated trial strategy" was responsible for the defendant's failure to object.[2]

2. The affidavits on which warrants authorizing searches of petitioner's apartments were issued contained sufficient information, independent of the reference to the tax stamp, to establish probable cause to believe that interstate gambling violations had been committed.[3] The similar eighteen-page affidavits recited, *inter alia*, that an informant, who had proved reliable in the past, had advised government agents that one Gilbert Beckley and some named employees were furnishing betting line information and accepting layoff bets with other gamblers. They then set forth a detailed analysis of telephone company records regarding numerous calls to various locations, including 386 to Nolan's Baton Rouge apartment and 10 to his New Orleans apartment, which corroborated the information and warranted the conclusion that a gambling operation was being conducted. The records showed use

[2] *Lookretis* was tried without a jury on a stipulation of facts.

[3] Petitioner did not object to the sufficiency of these warrants in the district court although he raised objections to the warrants issued to search the premises of his co-conspirator (A. 954–955).

of telephone credit cards in the name of non-existent firms, and abnormal shifts from heavy use of one card to heavy use of another in calls made to petitioner and nine other named bookmaking operations during a seven-month period (Appendix to Appellant's Reply Brief Below, pp. 1–38). Thus, even if the reference to petitioner's wagering tax stamp was improper, the other facts recited established probable cause for the warrants. A warrant containing both proper and improper grounds is valid if the proper grounds are sufficient to support a finding of probable cause. See *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Lucarz* v. *United States*, C.A. 9, No. 24936, decided June 2, 1970.[4]

3. Petitioner has no standing to challenge the legality of the two warrants to search premises occupied by Hines.[5] In *Alderman* v. *United States*, 394 U.S. 165, this Court held that a defendant lacks standing to object to the use of information obtained from illegal surveillance of the conversations of other persons on the premises of a co-defendant. It concluded: "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evi-

[4] In the latter case, the defendant argued that no inference supporting probable cause could arise from his exercise of the constitutional right to the assistance of counsel.

[5] The issue of the legality of these warrants was not raised in appellant's opening brief in the court below but was asserted as error in his reply brief.

dence. Coconspirators and codefendants have been accorded no special standing," 394 U.S. at 171–172. Contrary to petitioner's assertion, standing on the basis of "vicarious criminal liability" is embraced within this ruling.

4. The contention that the eight-day hearing on the motion to suppress the fruits of electronic surveillance was inadequate is answered by the opinion of the court below, upon which we rely (Pet. App. 13a–22a). Nor is the claimed conflict between the decision below and that of the Ninth Circuit concerning the legality of telephone company monitoring significant (Pet. 17–18). The monitoring was not disclosed to the government until several months after search warrants were executed at petitioner's premises in January 1966. This makes it clear that the prosecutor's statements do not, as petitioner asserts, indicate that the government's case derived from leads from telephone monitoring. Concededly, none of the tapes of the monitoring was introduced into evidence (Pet. 17). The monitoring was not related to evidence concerning use of telephone credit cards which was introduced at trial and has not been challenged in this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 268

EUGENE A. NOLAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief in Opposition seeks by a tenuous reading of the record [1] to avoid the first and last of the four questions stated in the Petition.

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[1] The Government also construes the record erroneously, we believe, so as to exaggerate greatly the strength of the prosecution's case against petitioner Nolan, in its Statement of facts. To dispel any possible conception that the harmless error rule could apply in this case, we note: (1) Contrary to the Government's suggestion (Br. 3), Hines' two employees, Mahoney (A. 881-93) and Gilmore (A. 894-910), each testified they had never met Nolan or heard his name during their employment by Hines (A. 892, 910). (2) Co[illegible] to the Government's statement (Br. 3), the record did not sh[illegible]ng distance telephone calls or wagering between

This Reply is accordingly addressed to the Government's record-based arguments on questions 1 and 4. With respect to questions No. 2 and No. 3,[2] the Government's argument contains no record references and the contentions which it makes are dealt with in the Petition.

Question 1(a): Nolan did not "imply" (Gov. Br. 4) that the Government relied on Nolan's wagering tax stamp in presenting its case against him. The Court of Appeals *found* that "The Government . . . sought to bring the stamp before the jury by way of references to it in testimony and arguments" (Pet. App. 9a). The Court of Appeals also found that "there was a real danger here that these references might become 'a significant "link in a chain" of evidence' tending to establish Nolan's guilt." (Pet. App. 7a.)

The issue is not whether Nolan's compelled purchase of the stamp was used to incriminate him; plainly it was. The issue is whether Nolan waived his privilege against self-incrimination by failure to interpose a *Marchetti-Grosso* objection prior to this Court's decision in those cases.

Hines and petitioner Nolan. What the record did show was (a) calls between the pay phone on Hines' premises in Tulsa and a number listed to an apartment leased or owned by petitioner Nolan in Baton Rouge, and (b) that petitioner Nolan was living in New Orleans and the Baton Rouge apartment was being used by his brother Jojo Nolan, a gambler suspected by the FBI of operating a good portion of his gambling business from the Baton Rouge apartment. (See Pet. 5-6, nn. 4-5; A. 1041-42, 1076-79; A. 911-25, 929-44, 1118, 1125 1180-81, 1188-89, 1217-24.)

[2] We refer to the numbering in the Petition. The Government has followed a different numbering in its Opposition, replying to Question No. 2 in its paragraph No. 3, and to Question No. 3 only in the first sentence of its paragraph No. 4.

The Government apparently seeks to absolve itself of responsibility for the use of the stamp because defendant's brother, Dr. Nolan, "volunteered" his reference to it at trial (Gov. Br. 4). The Government does not mention that it was the prosecution which called Dr. Nolan as a trial witness (A. 1022); that after indictment—and after the grants of certiorari in *Costello* v. *United States*, 383 U.S. 942 (1966) and *Grosso* v. *United States*, 385 U.S. 10 (1966)—the Government obtained pretrial discovery of Dr. Nolan's prospective trial testimony by calling him before the grand jury and questioning him about petitioner's gambling stamp (A. 2221-29); and that Dr. Nolan's reference to petitioner's gambling stamp before the petit jury was elicited on direct examination by the Government's use of the post-indictment grand jury testimony to refresh Dr. Nolan's recollection (A. 1023-25).[3]

The grand jury obviously had also heard pre-indictment references to petitioner's gambling stamp, for one of the overt acts alleged in the indictment was that petitioner "did obtain a Federal Wagering Tax Stamp." (A. 3.) The Government chose to include this allegation even though this Court had already granted certiorari in *Costello* v. *United States*, *supra*. Thus the Government did not anticipate from such grant of certiorari that proof of the wagering stamp would become inadmissible. Yet it would assert a waiver in petitioner's failure to interpose an objection

[3] An objection to Dr. Nolan's trial testimony as being the fruit of the post-indictment grand jury interrogation was overruled (A. 1023). Immediately following the overruling of this objection, the prosecution proceeded to utilize the grand jury testimony (A. 1023-25) and in response to a question as to what he said before the grand jury, Dr. Nolan replied: "I said he [petitioner] held a gambling stamp." (A. 1025.) This was how the petit jury originally learned of petitioner's gambling stamp.

urging that the trial Court anticipate a *Marchetti-Grosso* ruling excluding Dr. Nolan's testimony about petitioner's stamp. Such an objection would, moreover, have been futile to exclude Dr. Nolan's testimony, even if defense counsel could have anticipated what testimony Dr. Nolan would "volunteer" when the Government refreshed his recollection, for the trial court had just overruled an objection on similar grounds to the introduction of Hines' gambling stamp. (A. 1014-15.)[4]

The record simply does not show that conscious and intentional abandonment of a known constitutional right by petitioner, which would be prerequisite to finding a waiver even in circumstances where no problem of retroactivity was involved.[5] See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

The situation here, where petitioner was suddenly confronted at trial by Government-anticipated repetition of grand jury testimony concerning his gambling stamp, is far less conducive to a finding of conscious and deliberate waiver than the situation in *United States* v. *Lookretis*, 398 F.2d 64 (7 Cir. 1968). Petitioner is puzzled as to how the Government deems it helpful to its position that *United States* v. *Lookretis* was tried on a stipulation of facts and with-

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[4] While the question of standing was discussed, the trial court did not give lack of standing as the basis for this ruling.

[5] There were no factual findings on the waiver question, since that question was not in issue in the District Court. Speculation that the failure to object on *Marchetti-Grosso* grounds "*can be plausibly* attributed to" counsel's trial tactics (Gov. Br. 5, Pet. App. 9a, emphasis supplied), can hardly substitute for findings on petitioner's state of mind at the time of the alleged waiver. Of course, once Dr. Nolan's damaging testimony about the gambling stamp was before the jury, petitioner's counsel were obliged to cast it in the best light possible in summation.

out a jury (Gov. Br. 5, n.2). The defendant's stipulation that his wagering stamp be admitted in evidence is certainly a more deliberate action than a failure to object before the jury to damaging evidence suddenly elicited by the Government in the heat of trial. And, as a judge is normally presumed to exclude inadmissible evidence in reaching a verdict, the non-jury aspect of *Lookretis* strengthens petitioner's contentions. For the *Lookretis* court held that even that presumption could not save the conviction: " . . . [T]he trial judge would have had no reason, in this pre-*Marchetti* trial, to regard the recitals . . . concerning the application for and issuance of the federal wagering tax stamp as being inadmissible against the defendant on a Fifth Amendment challenge, which although not made was, nevertheless, in the posture of this case, not waived." 398 F.2d at 66. Petitioner should not be held to greater prescience than the *Lookretis* trial judge.

Question 1(b): The Government seeks to avoid the issue of whether *Marchetti* and *Grosso* may retroactively invalidate search warrants by contending that the affidavits would have shown probable cause without the factual allegations as to the wagering stamp. (Gov. Br. 5-6. The Government does not make this contention with respect to the searches of Hines' premises, see Pet. 5-6, but disputes petitioner's standing to challenge those searches.)

But in order to establish probable cause to search petitioner's apartment at 1051 Rittiner Drive, Baton Rouge, for bookmaking records and wagering paraphernalia, the crucial showing of the affiant was that petitioner had an occupational tax stamp to engage in the business of accepting wagers at that precise address. This allegation supplied the essential corroboration for the information ascribed to "infor-

mants", that petitioner operated a bookmaking enterprise at that address and kept most of his wagering records there. (Appendix to Reply Brief in Court of Appeals, 15-16.) Without this corroboration, the affidavit would have been insufficient under the test of *Spinelli* v. *United States*, 393 U.S. 410 (1969). No other facts were set forth in the affidavit to support the conclusory allegations that the unidentified "informants" were reliable. And absent the allegations as to the wagering stamp, the alleged placement of numerous long distance calls to Petitioner's number at 1051 Rittiner Drive would be "innocent-seeming" activity within the meaning of *Spinelli*.

That Nolan did not challenge the affidavit in the trial court (Gov. Br. 5, n. 3) misses the point. At the time of trial, the Government legitimately could use his self-incriminatory purchase of the wagering stamp for 1051 Rittiner Drive. Nolan had no ground to object to the affidavit at trial. But, between trial and appeal, the critical factual allegation in the affidavit was rendered objectionable.

The issue tendered by the Petition remains: whether Nolan may raise the objection now.

Question 4. The Government does not appear to challenge petitioner's contention that the Ninth Circuit's final judgment of illegality in *United States* v. *Nolan*, No. 24032 (9 Cir. 1970), collaterally estops the Government from defending the legality of the Nolan-Bubis monitoring here. (See Gov. Br. 7.)

The Government seeks to avoid the consequences of this determination of illegality by boldly asserting, without benefit of any record reference:

> "The monitoring was not related to evidence concerning use of telephone credit cards which was

introduced at trial and has not been challenged in this Court."[6] (Gov. Br. 7.)

The Government ignores not only the record but the opinion of the Court of Appeals. That opinion noted that the trial court, having found the monitoring lawful, never reached the issue of taint with respect to these tapes (Pet. App. 14a, 17a). And the Court of Appeals affirmed the ruling on legality, likewise not reaching the issue of taint (Pet. App. 17a-19a).

The fact that the tapes were concededly not themselves introduced into evidence (Gov. Br. 7) does not, of course, establish that no leads were obtained from them. Nor does the fact (Gov. Br. 7) that certain search warrants were obtained "several months" before the tapes' disclosure to the government. The indictment was not returned until more than eight months after the search warrants were executed (A. 6), so that the disclosure of the tapes long antedates the return of the indictment; and the taped conversations had occurred during the period covered by the indictment. (See Pet. App. 29a and the facts recited in *Bubis* v. *United States*, 384 F.2d 643 (9th Cir. 1967)).[7]

The prosecutor's statements cited in the Petition (Pet. 18a) are at least a prima facie indication that the

[6] We simply do not understand the concluding clause of this sentence. The monitoring was of course challenged in Question 4 of the Petition.

[7] The opinion below noted that the tapes involved here apparently resulted from the same surveillance described in *Bubis* v. *United States*, 384 F.2d 643 (9th Cir. 1967). (Pet. App. 19a.) Both the opinion in *Bubis* and the stipulated facts in the record in *United States* v. *Nolan*, No. 24032 (9 Cir. 1970), show that the electronic surveillance extended from December 1965 to March of 1966.

tapes did furnish leads for the prosecution. Under *Kolod* v. *United States*, 390 U.S. 136 (1968), the Government plainly is not permitted to make an *ex parte* determination that they did not furnish leads. Yet the concluding sentence of the Government's Brief, quoted above, is an attempt to do just that.

Petitioner does not ask this Court to find as a matter of fact that the tapes did taint the prosecution. In the absence of an evidentiary record on this point below, such a finding can neither be made nor precluded in the present posture of the case. Petitioner therefore asks, with respect to this aspect of the case,[8] that certiorari be granted and an adversary hearing on remand be ordered in accordance with the requirements of *Alderman* v. *United States* for determining the issue of taint.

Respectfully submitted,

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[8] In the event that the case is remanded for a new trial as a result of a grant of certiorari and decision favorable to petitioner on other questions presented in the Petition, then petitioner can obtain the necessary hearing on taint by renewing, prior to retrial, his pretrial motion to suppress these tapes in the District Court.